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Bedminster

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Ceiswick v. Bedminster

Brief of P in response to
intervention motion of Timber Prop & Dobbs

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JOSEPH H. RODRIGUEZ, PUBLIC ADVOCATE
DEPARTMENT OF THE PUBLIC ADVOCATE
BY: KENNETH E. MEISER, DEPUTY DIRECTOR
DIVISION OF PUBLIC INTEREST ADVOCACY
CN 850
TRENTON, NEW JERSEY 08625
(609) 292-1692

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION; SOMERSET COUNTY
DOCKET NOS. L-36896-70 P.W.
L-208061-71 P.W.

LYNN CEISWICK, ET AL.,	:	
Plaintiffs,	:	
vs.	:	
TOWNSHIP OF BEDMINSTER, TOWNSHIP COMMITTEE OF BEDMINSTER TOWNSHIP, and ALLAN DEANE CORP.,	:	Civil Action
Defendants.	:	

BRIEF OF PLAINTIFFS IN RESPONSE TO INTERVENTION MOTION OF TIMBER PROPERTIES, INC. AND LEONARD DOBBS

On The Brief:

KENNETH E. MEISER, ESQUIRE

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INTRODUCTION

Timber Properties and Dobbs have filed motions to intervene in this twelve year old case. The motion cannot be decided without considering novel questions about settlements of Southern Burlington County N.A.A.C.P. v. Mt. Laurel II, 92 N.J. 158 (1983) (hereinafter Mt. Laurel II) cases and judgments of repose. The Ceiswick plaintiffs in this brief will summarize their understanding of the procedures for, and rights to participate in, hearings concerning settlements and judgments of repose. With respect to this motion, they will distinguish between the right of Timber and Dobbs to ultimately be heard and their right to intervene now. The Ceiswick plaintiffs submit that at a later date Dobbs and Timber should be heard in opposition to a settlement or to Bedminster's attempt to seek repose. Right now, however, Dobbs and Timber have shown no need to intervene, and their intervention now would make a settlement between the present parties more difficult. Therefore, the motion to intervene should be denied without prejudice, with the assurance that the two will be permitted to be heard at a later date on their rights to object to a settlement or a motion by Bedminster in support of repose.

Mt. Laurel cases resemble representative litigation such as class actions and taxpayer lawsuits. These cases cannot be dismissed or settled without approval of the court. Before reviewing the merits of a proposed settlement, a Mt. Laurel II court must give notice to lower income persons and to persons with an interest in real property in the municipality so that they have an opportunity to be heard on any objections they may have. The purpose of a settlement hearing is not to try the case or to substitute the court's judgment for the judgment of the settling parties. The standard of a court in reviewing the settlement is whether it adequately protects the interests of

absent lower income households -- whether it is within the range of reasonableness. An objector has the right to be heard to assert that a settlement is not within the range of reasonableness either with respect to the fair share number or the methods chosen to implement the fair share.

Mt. Laurel II establishes the standards to be used at a compliance hearing in which a municipality seeks repose. At such a hearing, the court acts as a trier of fact, rather than merely reviewing the merits of a settlement. The court must decide whether an ordinance in fact complies with Mt. Laurel II, rather than whether a settlement is within the range of reasonableness. Despite these differences, because of the public importance of a grant of repose, objectors should liberally be permitted to intervene in opposition when a municipality seeks a judgment of repose.

The Ceiswick plaintiffs submit that Dobbs and Timber should ultimately have the right to be heard in opposition to a settlement or an attempt to seek repose. They should have the right to assert that a settlement is not within the range of reasonableness, or to assert that repose should be denied because the revised land use controls do not comply with the requirements of Mt. Laurel II.

Even though the Ceiswick plaintiffs believe that Dobbs and Timber ultimately have the right to be heard when Bedminster enters into a settlement or seeks a judgment of repose, their motions to intervene should now be denied without prejudice. Until there is a settlement or a rezoning, neither Dobbs or Timber are at any risk. Because this case is so old, the parties should be given the opportunity to try to reach a final settlement. Permitting intervention now will only make such a settlement more difficult. Morever, if intervention is granted now, the intervenors will have an immediate right of discovery. Such discovery is not necessary at this point, and would focus the efforts of the

parties away from settlement. Therefore, the plaintiffs submit that the motion to intervene should be denied without prejudice. Bedminister should be given a reasonable period to enter into a settlement agreement or to rezone. At the end of the sixty day period, Dobbs and Timber can renew their motion to intervene and should be permitted to intervene to challenge the settlement or the attempt to obtain repose.

One final point should be made. Because of the age of this case, there is a question about the timeliness of the intervention motions. Since this case is thirteen year old and Dobbs and Timber are now for the first time seeking to intervene, any grant of intervention should be strictly limited to issues relating to settlement and repose. The intervenors in this forum should not be permitted to assert "Takings" claims or claims relating to the arbitrariness of the way their property is zoned.

PROCEDURAL HISTORY

These two intervention motions cannot be evaluated without reviewing the history of this case. The complaint in Allan-Deane Corp. v. Bedminster Tp. was filed on August 23, 1971. A second lawsuit, Ceiswick v. Township of Bedminster was filed on June 1972. After a motion to consolidate was denied, the Ceiswick plaintiffs sought to intervene in the Allan-Deane case. The Supreme Court granted the intervention request, Allan-Deane Corp. v. Tp. of Bedminster, 63 N.J. 591 (1973) on March 5, 1973. Now, twelve and a half years after the initial complaint was filed and eleven years after the first intervention motion was granted, two new intervention requests have been made.

After the Ceiswick intervention motion was granted, the two cases, Ceiswick and Allan-Deane, were consolidated. A lengthy trial ensued and the Bedminster zoning ordinance was invalidated for the first time in 1975, and Bedminster's appeals were unsuccessful. Bedminster then rezoned and a second trial was held to determine the validity of the revised ordinance. Once again, in December 1978, the zoning ordinance of Bedminister was invalidated.

On February 22, 1980 the court appointed George Raymond as master to monitor the defendant's rezoning efforts. Lengthy proceedings took place before the master, and these proceedings produced still another zoning ordinance. This third zoning ordinance was approved by the court in an order for final judgment on March 20, 1981 despite the objections of the Ceiswick plaintiffs. A timely appeal was filed by the Ceiswick plaintiffs on two grounds: (1) the order granted corporate relief to Allan Deane without assuring that Allan Deane would provide 20% low and moderate income housing, and (2) the order declared that the Bedminster ordinance adequately provided for low and moderate income housing. The appeal was stayed until the decision

in Mt. Laurel II was rendered; subsequently on August 3, 1984, the Appellate Divsion remanded the matter to this court for further proceedings in light of Mt. Laurel II.

A status conference was held in this case on October 6, 1983, and a case management order entered on November 3, 1984. The case management order directed George Raymond, the master, to report to the court on Bedminster's fair share and whether the land use regulations of Bedminster make realistically possible the construction of the Township's fair share of lower income housing. The master was given sixty days to complete this review. In response, two reports were submitted by the master, one in January 1984 and one in March 1984.

The case is now at a stage where Bedminster will either enter into a settlement agreement with the Ceiswick plaintiffs or rezone on its own in accordance with the master's conclusions. Timber Properties and Leonard Dobbs have now filed motions to intervene in this case which are returnable on May 25, 1984. Both developers seek to challenge Bedminster's zoning ordinance and to obtain a developer's remedy.

I. THIS COURT SHOULD DENY THE MOTIONS TO INTERVENE WITHOUT PREJUDICE

Timber and Dobbs seek to intervene pursuant to R. 4:33-1 to protect their interest in their properties. Timber is concerned that Bedminster will rezone Timber's property to prevent it from building a high density inclusionary development. Dobbs is concerned that if Bedminster seeks and obtains a judgment of repose, it will be precluded from constructing the type of inclusionary development which it seeks to build.

The Ceiswick plaintiffs do not dispute the ultimate right of the proposed intervenors to challenge any settlement or any rezoning if the rezoning becomes the basis upon which Bedminster seeks repose. Nevertheless, until Bedminster takes such action, neither Timber nor Dobbs is being harmed and neither has an immediate claim of a right to intervene. Moreover, in view of the failure of either party to seek to intervene during the thirteeen year history of this case, there is a serious question about the timeliness of the motions; this delay certainly justifies judicial limitations on the issues which the proposed intervenors can raise, should they be ultimately permitted to intervene.

A. The Application for Intervention Is Not Timely

Rule 4:33-1, Intervention, provides:

> Upon timely application anyone shall be permitted to intervene in any action if the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (Emphasis added)

As the rule states, any intervention motion can be granted only if it is "timely." The untimeliness of this intervention motion is evident from a

review of the procedural history of the case. The proposed intervenors did not seek to intervene when the case was filed thirteen years ago, nor when the Supreme Court considered the Ceiswick intervention motion eleven years ago. The proposed intervenors did not seek to intervene in either of the two previous trials, nor when George Raymond was appointed as master. The proposed intervenors did not seek to intervene when the Ceiswick plaintiffs filed their notice of appeal. After the remand from the Appellate Division, there was once again no attempt to intervene. Timber Properties never once attended a single meeting with the master, nor expressed to him its desire to construct lower income housing throughout the entire review process. Although Dobbs did participate in the master's review process commencing in late 1983, it never made a motion to intervene despite its full awareness that the goal of the parties to the case was to reach a settlement on Bedminster's zoning ordinance just as a settlement had been reached on the Allan Deane planned unit development. Under these circumstances, the applications to intervene are not timely. Both intervenors have stood on the sidelines for thirteen years and are now dissatisfied with the conclusions of the master. Therefore, it is obvious from the procedural history in this case that the intervention motions are simply not timely.

The Ceiswick plaintiffs will explain in the remainder of this brief that they do not object to the limited participation of either proposed intervenor in the event that a settlement is reached or Bedminster seeks repose. It is apparent, though, that Dobbs and Timber wish to present to the court a complete picture of their grievances with the Township, and to allege every possible cause of action that may arise out of those grievances. For example, Counts Four and Five of the Dobbs' complaint allege "Takings" issues against Bedminster that are totally irrelevant to the Mt. Laurel II issues before the

court. After thirteen years, it is simply untimely to try to graft those extraneous matters onto this case.

This court has authority to grant intervention subject to conditions limiting the intervenors to issues presently before the court. See, Carroll v. American Fed'n. of Musicians of U.S. & Canada, 33 F.R.D. 353 (D.C.N.Y. 1963); Mitchell v. Singstad, 23 F.R.D. 62 (D.C.Md. 1959); Shapiro, Some Thoughts On Intervention Before Courts, Agencies and Arbitrators, 81 Harv. L. Rev. 721 (1968). Because of the thirteen year delay of the proposed intervenors in taking any legal action, this court should ultimately hold that the intervention motions will be granted, provided the intervention complaint is limited only to issues relating to a settlement agreement or to repose.

B. Until There Is A Settlement Or An Attempt To Seek Repose, Neither Timber Properties Nor Dobbs Has A Basis For Intervention As Of Right

At this point, Dobbs and Timber are free to file and litigate their own lawsuits concerning the zoning of their property. Nothing in the present case impairs that ability. Only if Bedminster seeks a judgment of compliance, based either upon voluntary rezoning or upon a negotiated settlement among the parties, will there be any potential impact on the interests of Dobbs or Timber. However, at this point there is no settlement and no rezoning by Bedminster; nor is there any attempt by Bedminster to assert that it is entitled to repose. Until either event occurs, there is no showing that the "disposition of the action may impair or impede either party's ability to protect its interest." Under Rule 4:33-1, the claim of a right to intervene would arise only if Bedminster settles or takes some action to seek repose. There is no present basis for intervention of right under R. 4:33-1.

C. This Court Should Deny Without Prejudice The Motion For Permissive Intervention

Timber and Dobbs also seek permissive intervention under R. 4:33-2 which provides:

> Permissive Intervention
> Upon timely application anyone may be permitted to intervene in an action if his claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state or federal governmental agency or officer, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the agency or officer upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

R. 4:33-2 also requires the court to look at the timeliness of the application. In addition, the court must look at the impact of the intervention upon the existing parties. After twelve years of litigation, the parties are attempting to reach a settlement of this case. Because this case is so old, the parties should be given the opportunity to try to reach a final settlement. Permitting intervention now will only make such a settlement more difficult.* Moreover, if intervention is granted now, the intervenors will have an immediate right of discovery. Such discovery is not necessary at this point, and would focus the efforts of the parties away from settlement. Therefore the plaintiffs

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* Plaintiffs recognize that a settlement could be entered into and approved by the court even if Dobbs and Timber were permitted to intervene and opposed the settlement. City of Paterson v. Paterson General Hospital, 104 N.J. Super. 472 (App. Div. 1969), affmd. 53 N.J. 421 (1969) is a state case directly on point. Certain taxpayers intervened in a lawsuit by Paterson against the defendant hospital. After the city and the hospital reached a settlement, the intervenors objected, alleging that there could be no valid settlement without the approval (continued on next page)

submit that the court should deny without prejudice the motion for permissive intervention since it will unduly delay or prejudice the adjudication of the rights of the original parties. The court should instead give the existing parties to the case sixty days to enter into a settlement or, alternatively, for Bedminster to complete its rezoning. After sixty days, or sooner if there should be a settlement agreement or a rezoning which is the basis for a repose claim, the motions to intervene can be refiled. If a settlement is entered into by the parties, then Dobbs and Timber should have the opportunity to be heard on the reasonableness of the settlement. If Bedminster rezones in accordance with the master's suggestions, then Dobbs and Timber should have the opportunity to oppose any attempt to obtain repose on the basis of the rezoning.

(footnote continued from previous page)

of the intervenors. The Appellate Division rejected this argument, stating:

> We find no merit in the intervenors' contention that the compromise of the litigation may not be approved over their objection and in view of their pending appeal. This action is a class action, see R.R. 4:36-1. It is not one instituted solely to enforce the alleged individual rights of plaintiff and intervenors...
>
> The intervenors have no greater or lesser right than any other member of the class. They cannot prevent approval by the court of a reasonable compromise of an action instituted for the benefit of the entire class of which they are only two individual members. Paterson, supra 104 N.J. Super. at 475.

Likewise, in Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983) the court's approval of a settlement of a class action was affirmed as reasonable despite the fact that twenty-three of twenty-seven named plaintiffs and nearly forty percent of the 1,517 member class opposed the settlement. A settlement was likewise approved as reasonable in Bennett v. Behring Corp., 96 F.R.D. 343 (S.D. Fla. 1982), despite the objection of one of three named class representatives and 600 to 700 class members. See also TBK Partners Ltd. v. Western Union, 675 F. 2d 456 (2nd Cir. 1982) (Settlement approved despite opposition of fifty-four percent of minority stockholders) and Saylor v. Lindsley, 456 F. 2d 896 (2nd Cir. 1976) (Settlement in stockholders' derivative action can be approved despite the objection of the named plaintiff).

Nevertheless, even though there could still be a settlement if intervention is permitted, it will be much easier to obtain a settlement if the intervention motion is denied without prejudice.

II. IN THE EVENT THAT A SETTLEMENT IS REACHED BETWEEN THE PARTIES, TIMBER PROPERTIES AND DOBBS HAVE THE RIGHT TO BE HEARD TO CHALLENGE THE REASONABLENESS OF THE SETTLEMENT

No court in New Jersey has passed upon the question of whether a judgment of compliance could be entered on the basis of a settlement. In this section, the Ceiswick plaintiffs will discuss their reasons for concluding that such repose can be granted, and that Timber and Dobbs have the right to be heard in objection to such a settlement. They will also discuss the standard of review, which is whether the settlement is in the range of reasonableness and adequately protects the interests of absent low and moderate income households.

A. Exclusionary Zoning Suits Can Be Settled Subject to the Approval of the Court

Under the new procedures formulated by the Supreme Court in Mt. Laurel II, including the provision for entry of a "judgment of compliance" that would bar subsequent litigation for a period of six years, exclusionary zoning litigation has become functionally a form of representative litigation, similar to class actions or taxpayer suits. Unlike ordinary lawsuits, see R. 4:37-1(a), such representative litigation cannot be terminated by mere agreement among the parties themselves to the potential prejudice of absent third persons. See R. 4:37-4 (class action cannot be dismissed without approval of the court); Tabaac v. Atlantic City, 174 N.J. Super. 519 (Law. Div. 1980) (taxpayer suits cannot be dismissed without approval of the court). Prior to termination of a representative suit on the basis of a negotiated settlement, the court must review and approve the settlement and

determine that it adequately protects the interests of the absent third parties. Where, however, the court has, with appropriate procedural safeguards to protect the interests of absent third persons, approved the negotiated settlement as "fair, reasonable, and adequate," it can enter a judgment based on the settlement that will bind third persons. See, City of Paterson v. Paterson General Hospital, 104 N.J. Super. 472 (App. Div. 1969) aff'd, 53 N.J. 421 (1969) (entry of consent judgment in class action); Moore's Federal Practice ¶23.60 nn. 8, 9. Tabaac v. Atlantic City, 174 N.J. Super. 519 (Law Div. 1980)(entry of consent judgment in taxpayer suit). Plaintiffs submit that the same principles govern entry of a "judgment of compliance" based on a court-approved settlement in an exclusionary zoning case.

Both federal and state class action rules expressly provide for settlement or compromise of class actions only on approval by the court. F. R. Civ. Pro. 23(e); R. 4:32-4.* It is now established that courts, with appropriate procedural safeguards to protect the interests of absent class members, may approve negotiated settlements in these circumstances and enter judgments on the basis of such settlements. These consent judgments have the same binding effect on absent class members as judgments entered following a plenary trial. See Conners v. Charles Pfizer & Co., 333 F. Supp. 296 (S.D.N.Y. 1971), aff'd mem. 450 F. 2d 1119 (2d Cir. 1971), cert. denied, 408 U.S. 930 (1972); Fowler v. Birmingham News Co., 608 F. 2d 1055 (5th Cir. 1979).

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* The principles governing termination of representative litigation have been most fully worked out in the context of class actions under Federal Rule of Civil Procedure 23 and its New Jersey analogue, R. 4:32. See generally, 3B J. Moore and J. Kennedy, Moore's Federal Practice ¶23.80 [1]-[4] (2nd ed. 1982)(hereinafter Moore's Federal Practice); 7A C. Wright and A. Miller, Federal Practice and Procedure §1797 (1972)(hereinafter Wright and Miller); 3H Newberg, Class Actions §§4900-6050 (1977); Manual for Complex Litigation §1.46 (1981) (supplement to 1 Moore's Federal Practice (2nd ed. 1982)) (hereinafter Manual for Complex Litigation).

Taxpayers suits, another similar form of representative suit, also illustrate the application of these principles. The New Jersey courts freely allow taxpayers to bring actions in lieu of prerogative writ to challenge the legality of actions by public officers or entities. See, e.g., Haines v. Burlington County Bridge Commission, 1 N.J. Super. 163, 179 (App. Div. 1949). These suits are deemed to be representative suits brought on behalf of all similarly situated taxpayers. Roberts v. Goldner, 79 N.J. 82, 85 (1979). Judgments in these suits, whether favorable or not to the taxpayer, are binding on all similarly situated taxpayers, even though other taxpayers may have had neither notice of the litigation nor an opportunity to exclude themselves. Roberts v. Goldner, supra; In re Gardiner, 67 N.J. Super. 435 (App. Div. 1961).

In Tabaac v. Atlantic City, 174 N.J. Super. 519 (Law Div. 1980), Judge Martin Haines, in a thorough and well-reasoned opinion, addressed the question of what binding effect a negotiated settlement of a taxpayer suit would have on other taxpayers. Judge Haines concluded that the court could enter a judgment on the basis of a negotiated settlement and that such a judgment would have the same binding effect on other taxpayers as a judgment entered after plenary trial:

> Settlement of litigation of all kinds is to be encouraged; public policy supports its amicable disposition. When taxpayer suits are concluded by court-approved settlement or by trial, the disposition should be final and binding on all taxpayers similarly situated. Any other result would be intolerable, subjecting defendants, frequently public bodies, to a multitude of suits, making settlement impossible and final judgments inconclusive. Certainty is as much a necessity and as much in the public interest in taxpayers' actions as in any other. 174 N.J. Super. at 534-35. (citations omitted)

The court also determined that, while taxpayer suits are not class actions under R. 4:32, the procedures and safeguards adopted by state and federal courts for approval of settlements of class actions are appropriate for approval of negotiated settlements in taxpayer suits. Id. at 534, 535.

Under the new principles and procedures announced by the Supreme Court in Mt. Laurel II, exclusionary zoning suits are functionally no different from other representative suits. Under Mt. Laurel II, a final "judgment of compliance" binds all lower income persons and any developer who might derivatively assert the rights of lower income persons. It bars all subsequent exclusionary zoning litigation by any party for a period of six years. Mt. Laurel II, 92 N.J. at 291-92. Exclusionary zoning litigation is thus functionally identical to other types of representative litigation, such as (b)(2) class actions and taxpayers suits. The same principles should therefore govern termination of the litigation by agreement among the parties. Parties may not stipulate to entry of a judgment on the basis of a mere agreement among themselves. Such a procedure would create a serious peril that the interests of absent lower income persons might be compromised away. This peril is of especial concern where the case has been brought by a developer and where no independently represented lower income persons have participated in the litigation. On the other hand, there is no reason why a court cannot enter a judgment of compliance based upon a negotiated settlement where, with appropriate procedural safeguards to protect the interests of absent lower income persons, the court has determined that the settlement is fair, adequate and reasonable.

B. Dobbs and Timber Are Entitled to Be Heard On The Propriety of Any Settlement

Exclusionary zoning suits are ordinarily not class actions within the technical requirements of R. 4:32. As discussed in the previous section, however, they are representative suits and closely analogous to class actions. In particular, a court considering an application for entry of a judgment of compliance based upon a negotiated settlement is faced with very much the

same concerns as a court considering a proposed settlement in a class action: Does the settlement fairly protect the interest of absent low and moderate income persons who will be bound by the judgment? Is it within the reasonable range of possible outcomes of the case if it were tried, in light of the intrinsic strengths and weaknesses of the case? Has the settlement been negotiated at arm's length with due concern for the interests of absent low and moderate households? These concerns are essentially identical to those commonly faced by courts considering applications for approval of settlements of class actions. See, e.g., Manual for Complex Litigation, ¶1.46. The procedures which the federal courts have formulated under F. R. Civ. Pro. 23(e) are designed to address precisely these types of issues.

In reviewing settlements, a consistent procedural framework has evolved. This procedure typically has two steps:

First, upon notice by the parties that a settlement has been negotiated, the court makes a determination that a settlement has been reached and, based upon the information provided by the parties, determines that the settlement is sufficiently within the "range of possible approval" to justify further proceedings. See Manual for Complex Litigation ¶1.46. The court also approves a means of providing notice to absent third parties who may be affected by the decision informing them of their right to object to the settlement.

Second, the court holds a hearing, at which testimony may or may not be taken, to approve the settlement. The specific criteria for review have been formulated in many different ways and will naturally differ from case to case, but the general overall standard is: Is the proposed settlement "fair, reasonable and adequate" to protect the interests of the absent class members? Manual for Complex Litigation ¶1.46. Objectors are given full opportunity to

present their objections to the court. Based upon this hearing the court may approve or disapprove the settlement, making specific findings of fact and conclusions of law. Id.

In Tabaac v. Atlantic City, supra 174 N.J. Super. at 534, 535, Judge Haines reviewed this procedure and found it appropriate for approval of negotiated settlements in taxpayer suits. Plaintiffs submit that this procedure is equally appropriate to exclusionary zoning litigation. Notice should be given to lower income persons and to those with an interest in real property in the municipality who might desire to construct lower income housing. Any lower income person or organization or person with an interest in real property has the right to object to a settlement.

Giving objectors the right to be heard serves two fundamental purposes. First, it offers procedural fairness to those whose rights may be irrevocably determined by the settlement. Second, it increases the court's assurance that in approving or disapproving the settlement it is acting properly in protecting the rights of parties who are not before the court. See Pettway v. American Cast Iron Pipe Co., 576 F. 2d 1157 (5th Cir. 1978). Since this case is analogous to a class action, Dobbs and Timber Properties should have the right to be heard before the court approves any Bedminster settlement. Their participation will help the court decide whether any settlement reasonably protects the interest of lower income households.

C. The Standard for Reviewing A Settlement Is Whether It Is Within The Range of Reasonableness

Any objector, however, has a somewhat limited role in challenging a settlement. The purpose of a settlement hearing is not to try the case or to substitute the court's judgment for the judgment of the parties. Paterson v. Stovall, 528 F. 2d 108, 114 (7th Cir. 1976); Manual for Complex Litigation ¶1.46 n.

123. The United States Court of Appeals for the Fifth Circuit in Reed v. General Motors Corp., 703 F. 2d 170, 172 (5th Cir. 1970) commented, "The court, however, must not try the case in the settlement hearing because the very purpose of the compromise is to avoid the delay and expense of such a trial."

The court's function is to ascertain whether the settlement adequately protects the interests of absent class members, whether it is within the realm of reasonable outcomes in light of the relative strengths and weaknesses of the case, and whether it was reached through arm's length negotiations without improper collusion. See, Moore's Federal Practice ¶23.80 at pp. 23-519 to 23-525 (citing cases).* 3 Newberg, Class Actions ¶5610c at pp. 500-1 suggests that the standard for review is whether the settlement is within the "range of reasonableness." As was stated in Newman v. Stein, 464 F. 2d 689, 693 (2nd Cir. 1972) cert. denied Benson v. Newman, 409 U.S. 1039 (1972)

> In any case there is a range of reasonableness with respect to a settlement - a range which recognizes the uncertainties of law and fact in a particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.

If a settlement falls within this range of reasonablensss, it should be approved by a court.

If Timber or Dobbs objects to a settlement, the only issue on which they can be heard is whether the settlement is within the range of reasonableness. The claim that, without a settlement, a developer might otherwise

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* In cases where the court needs assistance to evaluate the effect and fairness of the proposed settlement or where it is uncertain whether the parties before it are in a position to provide sufficiently complete and unbiased information, the court may appoint an expert to assist it in evaluating the proposed settlement. Manual for Complex Litigation ¶1.46 n. 144.

have brought a successful exclusionary zoning suit and have obtained a builder's remedy is not a relevant objection. Similarly, the fact that a developer's property could have been an alternative site for an inclusionary zoning development is not a grounds for objection. Finally, the fact that a settlement does not provide for the fair share number called for by an objector's expert witness or any particular fair share plan developed by any third party (e.g., the Lerman plan), is not determinative. The sole issues would be (1) whether the the fair share number agreed to by the parties is within the range of reasonableness, taking into consideration the various fair share plans and any municipal defenses which might reduce the fair share number; and (2) whether the methods of meeting the fair share reasonably provides a realistic opportunity for low and moderate income housing. In the event of a settlement, Dobbs and Timber certainly have the right, as do any other objectors, to demonstrate that the settlement is not within the range of reasonableness.

III. IN THE EVENT THAT A COMPLIANCE HEARING IS HELD, TIMBER PROPERTIES AND DOBBS HAVE THE RIGHT TO BE HEARD ON THE ISSUE OF WHETHER THE MUNICIPAL REVISIONS COMPLY WITH THE REQUIREMENTS OF MT. LAUREL II

Mt. Laurel II establishes a procedure for bringing a zoning ordinance into compliance after it has been invalidated on Mt. Laurel II grounds. Plaintiffs recognize that the third Bedminster zoning ordinance has not been invalidated upon Mt. Laurel II grounds, and that the issue of whether this third Bedminster zoning ordinance complies with Mt. Laurel II was remanded by the Appellate Division to this court for determination. Rather than having a trial on this issue after the remand, the parties consented to have the master work with the parties to produce revisions that would hopefully bring the zoning ordinance into complete conformity with the Mt. Laurel II decision. Plaintiffs suggest that even though this revision process was voluntary rather than involuntary, the judicial review process in this case for determining whether the Bedminster zoning ordinance is constitutional should follow the procedures set forth in Mt. Laurel II for determining compliance after invalidation.

Once a zoning ordinance is invalidated on Mt. Laurel grounds, a trial court must order the defendant to revise it, with directions to incorporate the affirmative devices discussed in the Mt. Laurel II decision. The revisions are to be completed within ninety days, unless good cause is shown for a further extension. Mt. Laurel II, supra at 281. The Mt Laurel II decision elaborates on its recommendations concerning the role of the master in this process. Id. at 282-4. George Raymond has acted in a role fully consistent with the Court's expectations. Id. at 282-4.

The decision is explicit about the court proceedings which will ensue once the revisions are complete:

> At the end of the 90 day period, on notice to all the parties, the revised ordinance will be presented in open court and the master will inform the court under oath, and subject to cross-examination, whether, in his or her opinion, that ordinance conforms with the trial court's judgment. The opinion, however, is not binding on the trial court. The master's powers are limited to rendering opinions, proposing findings, issuing recommendations, and assisting the court in other similar ways as it may direct. See, e.g., Fidelity Union Trust Co. v. Ritz Holding Co., 126 N.J. Eq. 148 (Ch. 1939). It is the trial court that must ultimately determine, independently, whether or not the municipality has conformed to its judgment and to the Mount Laurel doctrine. Mt. Laurel II at 284-5.

Such a compliance hearing is fundamentally different from a settlement hearing. The court is not reviewing the reasonableness of a settlement. The court is performing the traditional judicial role as a trier of facts. The court must determine fair share and whether the land use ordinance provides a realistic opportunity for the fair share. If the revised ordinance meets the municipality's Mt. Laurel obligation, the municipality is entitled to a judgment of compliance, which will give it six years' repose from subsequent litigation. The Mt. Laurel II decision also discusses judicial remedies whch can be imposed upon the municipality if the revised zoning ordinance fail to comply with the constitutional requirements. Id. at 286.

Therefore, Bedminster may amend its zoning ordinance and seek a judgment of compliance on the grounds that the new ordinance fully complies with Mt. Laurel requirements. Since such a hearing could involve the grant of repose and have a substantial prejudicial effect upon Timber and Dobbs, they should have a limited right to participate in the trial. The only issue before the court in that event would be whether the revised Bedminster land

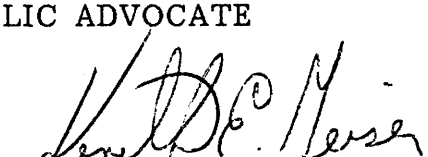
use provisions provide a realistic opportunity for the Township's fair share of low and moderate income housing.

Because of the motions submitted by Timber and Dobbs, it is also important to discuss those subjects that would be inappropriate for them to raise. Timber Property's brief states that it seeks to intervene in this suit "to present proofs concerning their ability to provide a substantial and significant amount of low and moderate income housing," p. 6. Such proofs would be irrelevant to this hearing because it does not involve the one issue before the court: has the Township provided for its fair share of lower income housing? If the Township has done this, the fact that there are other developers who own other properties on which low and moderate income housing could be built is of no consequence. Likewise Timber's brief alleges that the rezoning of Timber's property to a professional office zone would be arbitrary and capricious, and that Timber has expended over $150,000 in seeking to develop its property, p. 6. Once again, these contentions are irrelevant to the sole issue before the court in the compliance hearing -- whether Bedminster's land use revisions adequately comply with Mt. Laurel II. Even more objectionable are the "Takings" issues raised in Dobbs' complaint. The grant of intervention at the compliance hearing should be limited solely to the issue of Bedminster's compliance. Any grant of intervention should be conditioned upon the intervenors' agreement not to raise any collaterial issue.

CONCLUSION

Wherefore plaintiffs respectfully submit that the motion to intervene should be denied without prejudice. Bedminster should have sixty days to enter into a settlement agreement or rezone. At the end of the sixty days, Dobbs and Timber can renew their intervention motion.

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE

BY: 
KENNETH E. MEISER
DEPUTY DIRECTOR

Dated: May 22, 1984